

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 20080025

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY COLORADO ETHICS WATCH
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
SENATE MAJORITY FUND, LLC**

Background

This matter is a complaint pursuant to Colo. Const. art. XXVIII, sec. 9(2)(a) and the Fair Campaign Practices Act ("FCPA"), Section 1-45-101, C.R.S. *et seq.* Hearing was held October 2, 2008 at the Office of Administrative Courts ("OAC") before Administrative Law Judge ("ALJ") Matthew E. Norwood. Luis Toro, Esq. and Chantell L. Taylor, Esq. appeared on behalf of the Complainant Colorado Ethics Watch ("CEW"). Scott E. Gessler, Esq. and Mario D. Nicolais, II, Esq. appeared on behalf of the Defendant Senate Majority Fund, L.L.C. ("SMF").

On September 5, 2008 the Complainant filed a Motion for Summary Judgment. On September 25, 2008 the Defendant filed an Unopposed Motion to Extend Time For Response, which motion is hereby granted. On September 30, 2008 the Defendant filed its Response to Motion for Summary Judgment. Also on September 30, 2008 the parties filed a list of stipulated facts.

Based on the stipulation, there is no dispute that SMF is in violation of the requirement at Section 1-45-108(2)(a)(I) to report all spending over \$20 during the previous reporting period. In particular, SMF did not disclose the \$25,647.90 fee it paid through an agent, Rock Chalk Media, L.L.C., to Comcast Spotlight for television advertisements regarding Libby Szabo. Ms. Szabo is a candidate for the Colorado State Senate in District 19. SMF was required to report this expenditure July 7, 2008 but did not do so until August 1, 2008, the day after the complaint in this matter was filed.

Therefore, the ALJ grants summary judgment as to the issue of the violation. The only remaining issue is the fine to be imposed. CEW argues that a \$1,250 fine should be imposed at a rate of \$50 per day fine for the 25 days that the report was late. CEW relies Colo. Const. art. XXVIII, sec. 10(2)(a) for this \$50 per day rate. SMF argues that no fine should be imposed.

Findings of Fact

Based upon the evidence presented at the hearing and based on the stipulation of the parties, the ALJ finds as fact:

1. The stipulation provides and the ALJ finds as follows:
 - a. On or about October 10, 2007, SMF registered as a 527 Political Organization with the Colorado Secretary of State. See certified copy of October 15, 2007 letter from Alyssa Prohaska, Elections Division, Colorado Secretary of State, to Senate Majority Fund, LLC (attached as Exhibit 1 to CEW's *Motion for Summary Judgment*).
 - b. SMF is also a Colorado limited liability company with its principal office at 12237 E. Amherst Circle, Aurora, Colorado 80014. See certified copy of SMF Annual Report (September 20, 2007) (attached as Exhibit 2 to CEW's *Motion for Summary Judgment*).
 - c. SMF's stated purpose is supporting candidates for the state senate. See certified copy of Senate Majority Fund, LLC Political Organization Detail, filed October 10, 2007 (attached as Exhibit 3 to CEW's *Motion for Summary Judgment*).
 - d. On or about June 23, 2008, SMF, through its agent Rock Chalk Media, LLC ("Rock Chalk"), contracted to purchase television air time from Comcast Spotlight for a television advertisement "educating the public about Libby Szabo," a candidate for the Colorado State Senate in District 19. See SMF Record of Request for Purchase of Political Time and Agreement to Purchase Political Advertising Availabilities (June 23, 2008) (attached as Exhibit 4 to CEW's *Motion for Summary Judgment*); see also Affidavit of Carolyn Petersen at ¶3.
 - e. On or about June 23, 2008, Rock Chalk, acting as disclosed principal for SMF, entered into an Agreement to Purchase Political Advertising Availabilities with Comcast (Bresnan) Grand Junction, a copy of which is attached as Exhibit 5 to CEW's *Motion for Summary Judgment*. See *Peterson Aff.* at ¶3.
 - f. SMF purchased a total of 1956 television spots for the Szabo ad, which aired from June 25, 2008 to July 13, 2008. See Contract Data Report (attached as Exhibit 6 to CEW's *Motion for Summary Judgment*). See *Peterson Aff.* at ¶4.
 - g. SMF was invoiced \$25,647.90 as a "Net Advertising Fee" for June 2008. See Invoice (attached as Exhibit 7 to CEW's *Motion for Summary Judgment*); *Peterson Aff.* at ¶5.
 - h. A certified copy of SMF's initial Report of contributions and Expenditures for the period May 27, through July 2, 2008, filed July 7, 2008, (attached as Exhibit 8 to CEW's *Motion for Summary Judgment*). That report did not include a disclosure of the Szabo ad purchases. See Exhibit 9 to CEW's *Motion for Summary Judgment*.

i. SMF filed several adjustments to its disclosures during July and August 2008. See certified copies of Senate Majority Fund LLC Reports and Adjustments dated August 12, 2008 (attached as Exhibit 10 to CEW's *Motion for Summary Judgment*).

j. On July 31, 2008, CEW filed its *Complaint* regarding alleged campaign and political finance violations by SMF with the Colorado Secretary of State, Elections Division.

k. On August 1, 2008, SMF filed Spending Adjustments to disclose the Szabo ad purchase through Rock Chalk Media, and also to disclose \$21,307.00 in previously undisclosed expenses for production and postage paid to Targeted Creative Communications Inc. See Senate Majority Fund Spending Adjustments dated August 12, 2008 (attached as Exhibit 11 to CEW's *Motion for Summary Judgment* and Exhibit 12 to CEW's *Motion for Summary Judgment*).

l. Exhibits 1 through 12 to CEW's Motion for Summary Judgment are admissible into evidence.

2. The ALJ has admitted exhibits 1 through 12 into evidence.

3. SMF failed to report spending on the television advertisements as required by Section 1-45-108(2)(a)(I), C.R.S.

4. SMF has straightforwardly acknowledged its failure to file in this case.

Conclusions of Law

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. SMF failed to report spending on the television advertisements as required by Section 1-45-108(2)(a)(I), C.R.S.

2. Two sections of article XXVIII are important for this case. Section 9 is the process by which persons who believe there has been a violation may file a written complaint with the Secretary of State. The Secretary of State is then required to refer the matter for a hearing before an ALJ. If the ALJ finds that a violation has occurred, the ALJ is to render a decision including "any appropriate order, sanction, or relief authorized by this article." Colo. Const. art. XXVIII, sec. 9(2)(a).

3. Section 10 of article XXVIII sets out sanctions that the "appropriate officer" is to impose for violations of certain portions of article XXVIII and the FCPA. Section 1-45-108.5(1), C.R.S. requires political organizations such as SMF to report spending to the "appropriate officer." The appropriate officer is the person with whom the individual or organization must report according to section 1-45-109(1), C.R.S. Colo. Const. art. XXVIII, sec. 2(1) and Section 1-45-103(1), C.R.S. Section 1-45-109(1), C.R.S. provides that the reporting in this case is to be made with the Secretary of State.

4. Section 10 of article XXVIII provides that the Secretary of State “shall” impose a fine of \$50 per day for a late filing. The individual or organization fined may then appeal to an ALJ per sec. 10(2)(b)(I). According to that subsection, the ALJ “shall set aside or reduce the penalty upon a showing of good cause, and the person filing the appeal shall bear the burden of proof.”

5. This case is a proceeding according to Section 9, not Section 10. This is not an appeal from a fine imposed by the Secretary of State.

6. In accordance with the requirement in Section 9 that any fine be authorized by article XXVIII, the ALJ looks first to Section 10 for guidance on the amount of fine to be imposed. Twenty-five days at \$50 per day produces a fine amount of \$1,250.

7. The ALJ determines that it is appropriate to provide some reduction in the fine for SMF’s straightforward acknowledgment that it failed to timely report the spending in question. It is also appropriate to favorably consider the fact that SMF agreed to stipulate to the pertinent facts. This saved time and expense for both parties.

8. The ALJ therefore reduces SMF’s fine to \$1,000.

Agency Decision

It is the Agency Decision that the Defendant Senate Majority Fund, L.L.C. failed to report spending on television advertisements as required by Section 1-45-108(2)(a)(I), C.R.S. The Senate Majority Fund, L.L.C. is hereby fined \$1,000. The fine shall be deposited in the Department of State cash fund created in Section 24-21-104(3), C.R.S.

This Agency Decision is final and will be subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S.

DONE AND SIGNED

October 7, 2008

MATTHEW E. NORWOOD
Administrative Law Judge

Exhibits admitted:

For CEW: Exhibits 1-12 to the Motion for Summary Judgment. Exhibits 13 and 14 to Motion for Summary Judgment were not offered.

For SMF: None. The ALJ took judicial notice of exhibits 2 and 4 to SMF's Response to Motion for Summary Judgment. The ALJ denied admission into evidence of exhibits 1 and 3 to the Response to Motion for Summary Judgment.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **Agency Decision** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Scott E. Gessler, Esq.
Mario D. Nicolais, II, Esq.
1601 Blake Street, Suite 310
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Luis Toro, Esq.
Chantell L. Taylor, Esq.
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1630 Welton Street, Suite 415
Denver, CO 80202

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1560 Broadway, Suite 200
Denver, CO 80203

on this _____ day of October, 2008

Court Clerk